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**In the Supreme Court of the United States**

**OCTOBER TERM, 1971**

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**No. 71-1545**

**EARL L. BUTZ, SECRETARY of AGRICULTURE,  
And The UNITED STATES Of AMERICA  
PETITIONERS**

**v.**

**GLOVER LIVESTOCK COMMISSION  
COMPANY, INC.**

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**RESPONDENTS BRIEF IN OPPOSITION TO THE  
PETITION FOR WRIT OF CERTIORARI**

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**REASONS WHY THE WRIT SHOULD  
NOT BE GRANTED**

The Secretary filed its initial complaint against Glover on May 13, 1969, (App. A) and by letter dated May 20, 1969, (App. B) counsel for the Secretary offered Glover an opportunity to enter into a consent order, containing a 30-day suspension, (App. C) the

acceptance of which would have terminated these proceedings. Glover declined to accept the Secretary's position and by the filing of its answer set in motion the administrative processes that brought this matter through the judicial review of the Eighth Circuit and now to this Court on the Secretary's petition. The Court of Appeals below affirmed the Secretary on all counts but modified so much of the Secretary's order that imposed a temporary suspension of Glover's registration under the Act.

Glover accepted the judgment of the Court of Appeals and sought no further judicial review and it will accept for the purpose of its argument in opposition to this petition that the suspension in issue was not in excess of the Department's statutory authority. However, Glover does not abandon, for any purpose, the position it has maintained throughout the period of over three years this matter has been pending, that the sanction imposed bore no reasonable relationship to the violation administratively found to exist and constitutes an arbitrary and discriminatory administration of the Act.

The Solicitor General authorized the filing of the petition for a writ of certiorari and now brings the same on behalf of the Secretary of Agriculture and of the United States of America. A fair summary of the grounds relied upon in seeking this petition would seem to be as follows:

1. If an order of suspension or revocation of an administrative agency is authorized by statute, it cannot be judicially overturned unless it bears no reasonable relation to the unlawful practice

found to exist or constitutes a patent abuse of discretion.

2. Neither of the following grounds upon which the Court of Appeals apparently relied in setting aside the Secretary's suspension order justified its action:

(a) A suspension would not achieve uniformity of sanctions for similar violations.

(b) The cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate.

3. The decision of the lower court, if left standing, would constitute a threat to the statutory purpose of the Act in question and of other regulatory statutes, in that registrants would be less likely to comply with the applicable prohibitions against improper practices, if there were a significant possibility that any penalty imposed by the agency for violation of those prohibitions would be judicially revised.

1. As to the Secretary's first point, Glover concedes that orders of administrative agencies, if authorized by statute, are subject only to a limited scope of judicial review. Whatever the particular choice of words utilized to describe or define those limitations, in a particular case, the courts have consistently not interfered with an administrative determination relevant to factual matters if such a determination involved a complex problem about which the agency had accumulated experience and knowledge unobtainable

by the courts from the record before it. Further, this court and those acting under its rulings, has not interfered with an administrative choice of remedy merely because it was felt that another choice would have been preferable under the circumstances.

However, there has been no judicial abdication by the Courts as to its supervision over administrative action, as authorized and desired by Congress, even as to fact findings of an agency. "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion."—"Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body."—*Burlington Truck Lines v. United States*, 371 U. S. 156, 167.

Likewise, the courts have not withdrawn judicial protection to our citizens in the area of administrative choice of remedies. The remedy chosen will not stand if it is "unwarranted in law or is without justification in fact—" *American Power & Light Company v. S. E. C.* 329 U. S. 90, 112-113.

Cognizant of the potential hazards of unbridled administrative discretion, Congress has wisely devised a scheme whereby "agencies and courts together constitute a 'partnership' in furtherance of the public interest." *Columbia Broadcast System, Inc. v. F.C.C.* 454 F2d 1018, 1028 (C.A.D.C. 1971).

It, therefore, seems abundantly clear that no administrative action of any kind or character will stand the light of judicial review on the bare premise that

such action was within the statutory powers granted. The laudable efficiencies made possible by the tremendous powers granted the administrative agencies carry with them the inherent danger of irreparable damage from even the slightest abuse of that power and restraint, to the utmost degree, should be exercised by those agencies. Administrative efficiency alone should not be, and surely will never be, a sufficient reason to insulate an agency from judicial inquiry on behalf of a citizen with an alleged wrong.

2. Turning to the reasons given by the court below in modifying the Secretary's order relevant to the suspension, Glover would submit that either reason would be more than sufficient to justify the court's action in view of the fact the court found that "under these circumstances a suspension would be *unconscionable*." (Emphasis supplied.) (Petitioners App. A. 25). The circumstances were, of course, the factual findings of the Secretary which were affirmed by the Court of Appeals. If a suspension is *unconscionable*, then it necessarily follows that it "bears no reasonable relation to the unlawful practice found to exist," "is so lacking in reasonableness as to constitute an abuse of discretion," and is "a patent abuse of discretion."

(a) One of the two reasons given by the court below for its actions was that a suspension against Glover "would not achieve uniformity of sanctions for similar violations." The general administrative law does not require absolute uniformity of sanctions nor uniformity of any particular administrative position, *but the agency must give a reason when it reverses course. Secretary of Agriculture v. United States*, 347 U. S. 645, 653-654.

"A simple but fundamental rule of administrative law—is—that a reviewing court in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If the grounds are inadequate or improper, the court is powerless to affirm the administrative action.—" *Burlington Truck Line v. United States*, supra at 169.

The desirability of invoking uniform sanctions was a position embraced by the Secretary and not first espoused by the court below. The Judicial Officer cited as authority for his position *In re Roy C. Townsend, d/b/a Madison Stockyards*, 27 A.D. 68 (1968) and the cases cited therein. (Petitioner's App. B, 33). Those cases, of which there are four, are consistently cited by the Department in opinions involving suspension orders in weight violation cases. The first decided of these four is *In re Milton Silver*, 21 A. D. 1438 (1962) and is obviously considered by the Department as being the leading and controlling case on the question of suspensions and that the violations found there set the standard against which violations of other market agencies should be measured in deciding whether or not a suspension should be ordered. *In all cases except Glover*.

Therefore, the Secretary decided in 1962 that there should be uniformity as to suspensions for weight violations by the following language from *Silver* at page 1452:

"—Also respondent should be suspended as a registrant under the Act for a period of thirty



days, which is less than that recommended by complainant, to achieve some uniformity of sanctions for similar violations of the Act in other cases."

The Secretary's Judicial Officer may have indicated that the negligence of the respondent there in allowing the false weighings over an extended period of time would have been sufficient basis for the sanctions invoked, as mentioned by the petitioners in the footnote at page 11 of their brief, but the fact is that such negligence was not relied upon by the Secretary whose Judicial Officer made a specific finding based upon the eyewitness testimony of the Department's District Supervisor that the scales were back-balanced when used in his presence, an affidavit of the weighmaster that he intentionally underweighed livestock on instructions from his employer, 21 check weighings of various types and other documented evidence clearly establishing a pattern of deliberate and intentional short weighing practices. He summarized his findings with this language:

"In view of the foregoing, it is concluded that during the period January 5 through March 2, 1961, respondent willfully and *intentionally* violated Sections 307 and 312 (a) of the Act—and sections— of the regulations issued thereunder—by weighing calves in commerce at the stockyard at less than their true and correct weight, that is, weighing calves falsely and incorrectly, and by reason of the means employed to achieve that result, that is by *knowingly* weighing calves when the livestock scales were not in balance,—." (Emphasis supplied)

Uniformity of sanctions was found desirable by the Secretary in 1962 and there is nothing in the record that the Department has departed from nor finds it advisable to depart from that long standing position. The same is true as to the practice of invoking suspensions only when the weighing violation is found to have been done intentionally and knowingly. It must necessarily follow that the Department feels that effective enforcement of the Packers and Stockyards Act can best be served by adherence to these principles.

The Secretary's Hearing Examiner rejected Glover's claim that any weight gains as to the re-weighed animals was due to the fact that such animals had access to feed and water. At the conclusion of his finding on this point he stated as follows:

"Although all of the persons connected with the ownership of the respondent corporation who attended the hearing appeared to be admirable individuals, it is reluctantly concluded that the claim of pen shifts between weighings is unsupported.—." (Glovers App. 13)<sup>1</sup>

His proposed order was identical with that of the Secretary's Judicial Officer except that he ordered a suspension for a lesser period than recommended by the Secretary's administrator and by the Secretary's Hearing Examiner. In neither the Hearing Examiner's recommended decision nor the decision of the Judicial Officer is there even a hint of a suspicion that Glover intentionally, or deliberately or knowingly or flagrantly violated the Act.

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<sup>1</sup>"Glover App" refers to Glovers Appendix filed in the Court of Appeals.

There never has been a suspension, of a registration under the Act in question sanctioned by the Department of Agriculture in the absence of intentional and flagrant violations thereof. Glover so stated in its brief submitted to the court below May 25, 1971, over a year ago, no decision of the Department was cited to the contrary in the Secretary's brief, the question was again raised during oral argument of this matter in the court below and the attorney for the Secretary was invited by one of the Circuit Judges, even at that late date, to furnish the citation to any such case, none came and none being cited in the petitioner's brief before this Court, surely it must be assumed that none such exists.<sup>2</sup>

It necessarily follows that the Court of Appeals was entirely justified in modifying the Secretary's order as to the suspension for the reasons just discussed.

(b) As to the choice of remedy the question is not the power of the Secretary but rather the power of the courts to review the Secretary's actions.

The unanimous court below found the suspension to be "unwarranted and without justification in fact.", and further that under the circumstances a suspension would be "unconscionable." The current edition of

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<sup>2</sup>The statistics provided the Soliciter General by the Department of Agriculture and referred to in the footnote to page 11 of Petitioners Brief neither served to supply this lack of such an Agency Decision nor forms the basis for questioning the finding of the court below. Further the document apparently reflects 6, not 2 cease-and-desist orders without accompanying suspensions (The Soliciter General was kind enough to furnish Glover's counsel with a copy) and Glover found and discussed in detail 3 such reported decisions in its brief to the Court below.

Webster's Unabridged Dictionary defines "unconscionable" as:

- "1. Unreasonable; exceeding the limits of any reasonable claim or expectation; immoderate; as, an 'unconscionable demand'.
2. Not guided or influenced by conscience, unscrupulous."

If the Eighth Circuit Court of Appeals had any power whatsoever to review the penalty invoked against a citizen by the United States Department of Agriculture, surely those powers would include modification of a penalty to the extent the court found such penalty to be "unconscionable". Even a finding that an administrative order constituted a "patent abuse of discretion", pales into insignificance as against a finding that such an order was "unconscionable".

If an agency of the Federal Government orders a penalty against any person, firm or corporation that "exceeds the limits of any reasonable claim or expectation," then it should not be sustained by any rule of law and be unconstitutional on its face.

3. The reason why Glover is here today is probably found in the final point raised by the petitioners. If, in fact, a precedent has been established by Glover's actions in exercising its rights to be heard as to the damaging accusations made against it by the Federal Government, it should not be further penalized simply because it exercised those rights. It should not once again be subjected to the damaging publicity of this matter that will be generated by a government

sponsored news release.<sup>3</sup> Further, a reversal as to Glover's partial vindication below would not seem likely to invite deliberate, intentional and flagrant violations of the provisions of any regulatory statute, but it could very likely force otherwise innocent persons or organizations, who need a federal registration to remain in business, to accept an agency's offer of a consent order simply because they had lost confidence that the courts would give them any relief, regardless of the merits of their position.

### CONCLUSION

It is respectfully submitted that no valid reasons have been advanced, nor do any exist for the granting of the petition and that it, therefore, should be denied.

EDWARD I. STATEN  
Attorney at Law  
P. O. Box 5010  
Pine Bluff, Arkansas 71601

July, 1972

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<sup>3</sup>App. D E&FR are examples of the method employed.

APPENDIX A

UNITED STATES DEPARTMENT  
OF AGRICULTURE

May 13, 1969

CERTIFIED RECEIPT REQUESTED

Glover Livestock Commission Company, Inc.  
Pine Bluff, Arkansas 71601

Gentlemen:

Subject: *In re Glover Livestock Commission Company, Inc., Respondent*—P. & S. Docket No. 4156

Enclosed is a copy of a complaint filed with this office under the Packers and Stockyards Act, 1921, as amended.

In accordance with the rules of practice governing proceedings under the Packers and Stockyards Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and three copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Your answer, as well as any motions or requests that you may wish to file hereafter in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, Office of the Secretary, United States Department of Agriculture, Washington, D. C. 20250.

Sincerely yours,  
Eugene R. Meyer  
Hearing Clerk

Enclosures—2

## APPENDIX B

UNITED STATES DEPARTMENT  
OF AGRICULTURE  
OFFICE OF THE GENERAL COUNSEL

Glover Livestock Commission Company, Inc.  
Pine Bluff, Arkansas 71601

May 20, 1969

Gentlemen:

Subject: In re Glover Livestock Commission Company, Inc. Respondent. P. & S. Docket No. 4156.

This is with reference to the Complaint filed in the above-captioned matter charging you with violations of the Packers and Stockyards Act. Your answer to such Complaint is due within 20 days after service of the Complaint upon you.

This matter may be disposed of by the Consent Order Procedure, without hearing, if you so desire. There are enclosed copies of a form of answer consenting to a specified order. If you desire to dispose of this matter without a hearing, you should execute the original and three copies of the enclosed answer and return them to the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250. If you elect to follow the Consent Order Procedure, the complainant will recommend that the Order consented to be issued, and the final Order will be submitted to the Judicial Officer of the Department without further proceedings.

If, however, you desire a hearing with reference to the matters alleged in the Complaint, you should file an answer as specified in the Complaint and the



rules of practice, and the hearing will be held in due course.

If you have any questions with reference to this matter, you may take them up with the Area Supervisor, Packers and Stockyards Administration, or directly with me. The name and address of the Area Supervisor are: Mr. Kenneth F. Grizzell, Room 831, Federal Building, 167 North Main Street, Memphis, Tennessee 38103.

Sincerely,

**RONALD M. GASWIRTH**  
Attorney for Complainant

Enclosures

## APPENDIX C

UNITED STATES DEPARTMENT  
OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re:	) P. & S. Docket
Glover Livestock Commission	) No. 4156
Company, Inc.,	)
Respondent	) Answer

In answer to the Complaint filed in this proceeding, respondent states as follows.

1. Respondent admits the facts alleged in paragraph 1 of the Complaint and further admits that the Secretary has jurisdiction in this matter.

2. Respondent neither admits nor denies the remaining allegations contained in the Complaint.

3. Respondent, for the purposes of this proceeding and for such purposes only, consents to the issuance of an order containing findings of fact and conclusions based upon the allegations set forth in the Complaint as the findings of fact and conclusions of the Secretary of Agriculture.

4. Respondent waives oral hearing and the report of the Hearing Examiner and consents to the entry of the order set forth below, which order shall have the same force and effect as if entered after full hearing and shall be effective on the sixth day after service upon respondent.

**ORDER**

Respondent, its officers, directors, agents, and employees, directly or through any corporate or other device, in connection with its livestock transactions in commerce, shall cease and desist from: (1) weighing livestock at other than the true and correct weights; (2) issuing scale tickets or accountings on the basis of false and incorrect weights; (3) paying the consignors of livestock on the basis of weights other than the true and correct weights; and (4) failing to operate livestock scales owned or controlled by respondent in accordance with the regulations under the Act constituting **INSTRUCTIONS FOR WEIGHING LIVESTOCK**.

Respondent shall keep accounts, records, and memoranda which fully and correctly disclose all transactions involved in its business under the Act, including among other things, scale tickets, accounts of sale, and buyers bills, which show the true and correct weights of livestock sold by respondent on a weight basis.

The respondent is suspended as a registrant under the Act for a period of 30 days.

This order shall become effective on the sixth day after service upon respondent. Copies hereof shall be served upon the parties.

## APPENDIX D

UNITED STATES DEPARTMENT  
OF AGRICULTURE

Sylvester DU 8-7415

Washington, Feb. 17, 1971

McDavid DU 8-4026

Arkansas Livestock Firm Suspended for Violating P&S Act:

Glover Livestock Commission Company, Inc., of Pine Bluff, Ark., has been suspended as a registered livestock market for violating weighing and accounting requirements under the Packers and Stockyards Act, the U. S. Department of Agriculture said today.

The firm operates a stockyard, and is registered as a livestock market agency to sell in commerce.

USDA Judicial Officer Thomas J. Flavin suspended Glover Livestock Commission Company, Inc.'s registration under the P&S Act for 20 days, starting March 1, 1971. The firm may not operate as a market agency during that time.

The firm, its officers, directors, agents, and employees were also ordered to cease and desist from:

(1) Weighing livestock at other than their true and correct weights;

(2) Issuing scale tickets on the basis of false and incorrect weights;

(3) Paying livestock consignors on the basis of false weights; and

(4) Failing to operate its livestock scales in accordance with P&S regulations.

The firm was also ordered to keep complete accounts and records which correctly disclose all transactions involved in its business under the Act.

The cease and desist order—like a permanent injunction—was issued to insure future compliance with the P&S Act.

Glover Livestock Commission Company, Inc. requested an oral hearing on the complaint. It was held before a USDA Hearing Examiner on January 28-29, 1970, in Pine Bluff, Arkansas.

After the Hearing Examiner issued a recommended decision, the firm filed exceptions and oral arguments were held in Washington, D. C., before Judicial Officer Thomas J. Flavin on Dec. 2, 1970.

The P&S Act is a fair trade practices law. It promotes and maintains fair and open competition in the marketing of livestock, poultry and meat.

The record in this case is open to the public. Copies of the order, P&S Docket 4156, may be obtained from the Information Officer, Packers and Stockyards Administration, USDA, Washington, D. C. 20250

**APPENDIX E**

**ARKANSAS GAZETTE**  
**March 3, 1971**

**To Whom It May Concern:**

Enclosed is the article concerning the suspension of Glover Livestock Auction Co. The article is by United Press International and moved from that press service's Washington Bureau.

**LEROY DONALD**  
**State Editor**

APPENDIX F

UNITED STATES DEPARTMENT  
OF AGRICULTURE

Sylvester DU 8-7415

Washington, Feb. 23, 1971

McDavid DU 8-4026

**Arkansas Livestock Firm's Suspension is Stayed:**

The suspension of Glover Livestock Commission Company, Inc., of Pine Bluff, Ark., has been stayed pending the outcome of the firm's appeal to the Eighth Circuit Court, the U. S. Department of Agriculture said today.

In an order issued Feb. 5, 1971, USDA Judicial Officer Thomas J. Flavin found Glover Livestock Commission Company, Inc. in violation of accounting and weighing regulations under the Packers and Stockyards Act, a fair trade practices law. Its registration as a market agency was suspended, beginning March 1, 1971.

The Judicial Officer has now stayed the order until the U. S. Circuit Court of Appeals for the Eighth Circuit issues its decision.

Proceedings of this case are open to the public. Copies of the order, P&S Docket 4156, may be obtained from the Packers and Stockyards Administration, USDA, Washington, D. C. 20250.